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No. 96-1092

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

BRYAN H. CRAWFORD and JIM ATWELL, a partnership doing business as ADVANCED PUBLICATIONS; ISG COMMUNICATIONS, INC., a California corporation; BOLD TYPE, INC., a California corporation; WAYNE C. BERRY, doing business as ZAP DISTRIBUTORS; and LISA LASCODY,

Petitioners,

v.

DANIEL E. LUNGREN, individually and as Attorney General of the State of California; JAMES KENNETH HAHN, individually and as City Attorney for the City of Los Angeles; CHIEF WILLIE WILLIAMS, individually and as Police Chief for the City of Los Angeles; GILBERT GARCETTI, individually and as District Attorney for the County of Los Angeles; THOMAS W. SNEDDON, JR., individually and as District Attorney for the County of Santa Barbara; MICHAEL D. BRADBURY, individually and as District Attorney for the County of Ventura,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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ARGUMENT

I. THE CALIFORNIA STATUTE SERVES THE COMPELLING STATE INTEREST OF SHIELDING MINORS FROM INDECENT OR HARMFUL MATTER

As the Court of Appeals noted, "The State's compelling need to protect children from these publications [harmful matter] has been satisfied by the use of a statute which accomplishes the purpose with a precision that protects our First Amendment interests. Neither concern has been sacrificed to the needs of the other." (Appendix to Petition for Writ of Certiorari ("App.") page 20)

The material at issue here is "harmful matter." " 'Harmful matter' means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." (California Penal Code § 313(a); App. page 56)

The trial court found that publications distributed by the present petitioners are analogous to the "Yellow Pages," in that they predominately show pictorial advertisements and list telephone numbers for particular services. Two basic types of advertisements are contained in these publications. The first solicits, at the very least, phone sex. The second can be described as personal advertisements, whereby any person having access to these publications can call a number and leave a message, usually at a rate of $2.98 a minute, for a person who has

placed an advertisement. (App. pages 30-31) Both courts below properly concluded that the state has a compelling interest in shielding minors from this kind of harmful matter.

The California statute, Penal Code § 313.1(c)(2), does no more than prohibit harmful matter from being distributed from unattended newsracks in locations accessible to children, where any child with the requisite number of coins may have unlimited access to salacious materials.

The statute here at issue breaks no new ground either as to the materials it regulates or the state interest it furthers. As to the matter regulated, the definition of "harmful matter" of the California statute quoted above closely tracks the language of this Court in *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973), adapting the definition of obscenity to define material harmful to children. The state interest furthered by the California statute is the interest established by *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct 1274, 20 L.Ed.2d 195 (1968) and *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) and reiterated in *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126; 106 L.Ed.2d 93, 105; 109 S. Ct. 2829:

> "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. *Ginsberg v. New York*, 390 U.S. 629, 639-640 (1968); *New York v. Ferber*, 458 U.S. 747, 756-757 (1982). (*Sable Communications of Cal., Inc.*

v. FCC, 492 U.S. 115, 126; 106 L.Ed.2d 93, 105; 109 S. Ct. 2829, 2836-2837).

Thus, this petition should be denied.

II. THE QUESTIONS PRESENTED BY THIS CASE ARE NOT SIMILAR TO THE QUESTIONS PRESENTED BY *RENO v. AMERICAN CIVIL LIBERTIES UNION* (No. 95-511)

The questions at issue here are no more similar to the questions presented by *Reno v. American Civil Liberties Union* than a newsrack is similar to the Internet. Most significantly, an unattended newsrack in a location accessible to children exposes the contents of the newsrack to any child with the requisite coins, with or without parental consent. In contrast, few if any children have unlimited access to the Internet, unless their parents, or teachers, or other adults choose to provide such access. Not all children live in homes with computers. Newsracks, however, are freely accessible to all. It is the unlimited, unsupervised, anonymous availability of harmful matter to children that the California newsrack statute prohibits.

While there may be a viable dispute in *Reno*, there is none here. Both courts that have reviewed this statute have correctly concluded that the statute does not violate any provision of the Constitution (App. 20, 34). This court should reach the same conclusion.

III. PETITIONERS' SUGGESTED ALTERNATIVES HAVE ALREADY BEEN REJECTED BY THE COURTS

Petitioners erroneously claim the statute imposes a total ban on their distribution. Both courts below, however, rejected this argument (App. 18, 19, 31). In addressing the question of whether the California statute uses the least restrictive means available to accomplish its ends, the Court of Appeals noted that if a plaintiff or the court can imagine and allude to other means, the state has the ultimate burden of showing that the means in question are not effective (App. page 13).

In this Court, as in the courts below, petitioners suggest warning labels and geographical restrictions. Alternatives so obviously naive and ineffective as those suggested by petitioners merit the uniform rejection by the district court, court of appeals, and other courts in which the suggestions have been made (*Sebago, Inc. v. City of Alameda*, 211 Cal.App.3d 1372, 1386 (1989); *Berry v. City of Santa Barbara*, 40 Cal.App.4th 1075, 1085 (1995).) Further, no purpose would be served by conducting formal legislative studies as to the deterrent effect of newsrack warning labels, an alternative characterized by the court of appeals as bordering on the absurd (App. 16).

Contrary to petitioners' assertions, legislative findings are not required (App. 12-15). Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote (App. 14). As the court of appeals concluded, "[t]he statute is effective in limiting children's exposure and has a narrow focus, which still

allows adults to purchase the materials from alternative sources or in alternative ways. It tightly fits the State's compelling interest." (App. 16)

IV. THE STATUTE DOES NOT LIMIT THE CONTENT OF ADULT COMMUNICATIONS TO THAT WHICH IS SUITABLE FOR CHILDREN

The statute here clearly does not limit or affect in any fashion the content of petitioners' publications (App. 3, 4). There is no total ban on the distribution of petitioners' materials. Only the means of distribution of the publications is affected, and as both the district court and the court of appeals noted, there are a variety of alternative means of distribution, including newsracks in locations from which children are excluded (App. page 31, findings 19-20; App 18).

V. THE COURTS BELOW PROPERLY FOUND THERE WAS NO CONSTITUTIONAL VIOLATION

Petitioners' claim that the courts below held that protected speech may be banned on the theory that adults may obtain the material in alternative ways is not accurate; neither court so held. Both the district court (App. page 33, conclusion 5) and the court of appeals (App. 19) held that the California statute passes constitutional muster because it is narrowly tailored to serve a compelling state interest. The fact that adults may obtain harmful matter in numerous ways other than unattended newsracks is but one factor in the analysis, and neither the

district court nor the court of appeals held that alternative means of distribution standing alone are sufficient to sustain the statute.

Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155 (1939) did not involve indecent or harmful matter, and fails to support petitioners' position. *Schneider* involved municipal ordinances essentially banning the distribution of pamphlets and handbills on public streets, primarily for the purpose of keeping the streets free of litter. Not suprisingly, this court found the purpose of keeping the streets clean and of good appearance insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it (308 U.S. at 162). In rejecting the suggestion that such an ordinance would be valid because its operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places, this court stated that

> " . . . one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (308 U.S. at 163)

Schneider does not apply here because unattended newsracks are not appropriate places for distribution of indecent or harmful matter, in that unattended newsracks make the indecent or harmful matter available to children. The California statute is not justified simply because indecent or harmful matter can be distributed in other ways to adults, but because it is narrowly focused to protect children from the indecent or harmful matter (App. 16).

VI. CONCLUSION

The unlimited anonymous availability of newsrack materials to anyone having the requisite coins makes an unattended newsrack inappropriate for the distribution of harmful matter in locations accessible to children. The California statute does no more than regulate a means of distribution available to children, and does not affect the myriad means of distribution available only to adults. No substantial issue as to the constitutionality of the California statute has been shown by petitioners, and therefore their petition of writ of certiorari should be denied.

Respectfully submitted,

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